

ONE HUNDRED SIXTH LEGISLATURE - SECOND SESSION - 2020
COMMITTEE STATEMENT
LB902

Hearing Date: Monday January 27, 2020
Committee On: Banking, Commerce and Insurance
Introducer: Pansing Brooks
One Liner: Adopt the Uniform Trust Decanting Act

Roll Call Vote - Final Committee Action:
Advanced to General File

Vote Results:

Aye: 8 Senators Gragert, Howard, Kolterman, La Grone, Lindstrom,
McCollister, Quick, Williams

Nay:

Absent:

Present Not Voting:

Oral Testimony:

Proponents:

Senator Patty Pansing Brooks
Ben Orzeske
Kim Robak

Representing:

Introducer
Uniform Law Commission
Nebraska State Bar Association

Opponents:

Representing:

Neutral:

Representing:

Summary of purpose and/or changes:

This bill would enact a Nebraska version of the Uniform Trust Decanting Act (UTDA), which was promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) in 2015. The UTDA provides a method for reforming or modernizing the terms of an irrevocable trust. "Decanting" is the terms used to describe the distribution of assets from one trust into a second trust, like wine is decanted from the bottle to another vessel. Decanting can be a tool for adopting to unforeseen circumstances. THE UDTA allows a trustee to reform an irrevocable trust document within reasonable limits that ensure the trust will achieve the settlor's original intent. The act prevents decanting when it would defeat a charitable or tax-related purpose of the settlor.

Sections 1 through 6 of the act deal with the scope and application of the act, fiduciary duty, and definitions. Section 1 names the act. Section 2 contains definitions. Definitions of terms used only in one section are found within that section. Section 3 addresses the types of trusts to which the act applies (or does not apply) and Section 5 describes the connections to Nebraska that are sufficient for a trust to utilize the act. Section 4 addresses fiduciary duty in exercising or not exercising the decanting power. Section 6 addresses reliance on prior decantings, including decantings performed under other states' laws.

Sections 7 through 10 of the act deal with the procedures for exercising the decanting power. Section 7 sets forth the notice requirements for decanting. Section 8 deals with representation of beneficiaries, including the representation of certain charitable interests by the Attorney General or other appropriate official. Section 9 describes the authority of the court with respect to decanting. Section 10 describes the formalities for decanting.

Sections 11 through 23 contain the heart of the decanting power and describe what modifications can be made by decanting. Section 11 delineates the decanting power when the authorized fiduciary has expanded distributive discretion and section 12 delineates the decanting power when the authorized fiduciary has limited distributive discretion. Section 13 contains special rules to facilitate decanting into a special-needs trust for a beneficiary with a disability. The Uniform Trust Decanting Act permits a trust to be decanted to modify the interest of the beneficiary with a disability even if the trustee does not have expanded distributive discretion. When a trust has a beneficiary with a disability, it may not be in the beneficiary's interest to make mandatory distributions to the beneficiary. Further, it may be in the beneficiary's interest to restructure the trust as a special-needs trust so that the trust does not adversely affect the beneficiary's qualification for governmental benefits. This carries out the settlor's probable intent if the settlor had known of the beneficiary's disability. Section 14 provides special rules to protect charitable interests.

Sections 15 through 20 generally provide limitations on the exercise of the decanting power. Section 15 addresses how express restrictions contained within the first-trust instrument may limit the decanting power. Sections 16, 17, and 18 impose limitations on an authorized fiduciary exercising the decanting power in ways that might be considered self-dealing. Section 16 restricts decanting to increase the authorized fiduciary's compensation. Section 17 restricts decanting to increase the authorized fiduciary's protection from liability. Section 18 restricts the modification or elimination of a provision permitting a person to remove or replace the authorized fiduciary. Section 19 imposes limitations on the decanting power that may be necessary to avoid disqualifying a trust for a particular tax benefit. Section 20 addresses limits on the duration of a trust, such as the rule against perpetuities.

Section 21 makes clear that even though the extent of the authorized fiduciary's power to decant is generally determined based upon the degree of discretion over principal distributions, the authorized fiduciary may exercise the decanting power even if the authorized fiduciary would not have made a discretionary distribution at such time.

Section 22 contains the remediation provision that is intended to salvage imperfect decantings. Section 23 authorizes under certain circumstances decanting of trusts for the care of an animal.

Sections 24 through 29 and Section 31 contain miscellaneous provisions. These provisions include Section 25, which recognizes that when a trust has been decanted it may no longer be obvious who the settlor is for different purposes and addresses who should be treated as the settlor for different purposes. Section 26 provides a default rule for determining whether the first trust or second trust owns later-discovered property. Section 27 makes clear that liabilities of the first trust are also liabilities of the second trust to the extent it received property from the first trust.

Section 30 would amend Neb. Rev. Stat. sec. 76-902 to provide that the documentary stamp tax does not apply to deeds transferring property pursuant to the Uniform Trust Decanting Act.

Matt Williams, Chairperson